

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

TIMOTHY SHIELDS



NOTICE OF APPLICATION

TAKE NOTICE that an application will be brought by Timothy Shields ("the applicant") to the trial Judge, Judge Doherty, on Tuesday, May 30, 2017, at the courthouse at 222 Main Street, Vancouver, British Columbia, for orders as follows:

1. A declaration that the actions of the Department of Justice ("DOJ") lawyer, Ms. P., in communicating with, and providing instructions and directions to, the RCMP criminal investigators respecting a criminal investigation into her former client, the applicant:
 - a. breached the ethical and fiduciary duties, including those of loyalty and confidentiality, owed to the applicant; and
 - b. thereby breached the applicant's s. 7 *Charter* rights.
2. A declaration that the actions of Supt. Sean Sullivan of the Royal Canadian Mounted Police ("RCMP") in communicating the gist of a "without prejudice", liability denied, confidential to the litigation settlement offer, made by the applicant to Anitra Singh, to the RCMP criminal investigators, which was then provided to Crown counsel:
 - a. breached implied undertakings of confidentiality and settlement privilege attaching to those communications;
 - b. prejudiced the applicant by disclosing his defence to the criminal allegations before this Court; and

- c. thereby breached the applicant's rights as guaranteed by ss. 7, 8, 11 and 13 of the *Charter*.
3. A declaration that each of the actions of the DOJ and RCMP identified, and the cumulative actions of the DOJ, Ms. P. and the RCMP investigators, caused irreparable prejudice to the applicant, constitute an abuse of process at common law and/or amount to a breach of the applicant's rights under s.7 of the *Charter*.
4. An Order granting a judicial stay of proceedings for abuse of process at common law, or alternatively, pursuant to s.24(1) of the *Charter*.
5. Alternatively, an Order that the evidence of Ms. Singh be excluded from the trial of this matter, pursuant to s. 24(2) of the *Charter*.

FACTS ON WHICH THIS APPLICATION IS BASED

Factual and Procedural Background

6. The applicant stands charged with one count of sexual assault of the complainant, Anitra Singh. The Information, dated May 10, 2016, alleges that:

“between the 1st day of July, 2009 and 30th day of October, 2010, at or near Vancouver, in the Province of British Columbia, [he] did sexually assault A.S.”
7. On August 1, 2013, Atoya Montague filed a notice of civil claim (the “Montague Claim”) against the applicant, the Attorney General of Canada (“AGC”), and the Minister of Justice of British Columbia in the Supreme Court of British Columbia, Vancouver Registry, under File No. S-135796. The claim alleged, *inter alia*, that the applicant had sexually assaulted Ms. Montague.
8. Pursuant to the *Department of Justice Act*, R.S.C. 1985, c. J-2, and the Treasury Board Policy on Legal Assistance and Indemnification (the “TB Policy”), the DOJ is the

presumptive legal representative of the AGC and any individual Crown servants named as defendants in civil litigation.

9. The TB policy has significant implications for the legal and Constitutional rights of approximately 290,000 federal servants, including over 29,000 RCMP employees.

10. The TB Policy provides, at Part 8.2, that the DOJ is responsible for:

- providing legal advice to approval authorities and their organizations;
- providing litigation services to the Crown and to the Crown servants approved for assistance under this policy, including the conduct of the litigation, either through a Department of Justice counsel or an external counsel retained as an agent of the Attorney General, with the Minister of Justice having ultimate responsibility for selecting and instructing the agent;
- ensuring, in cases where two or more Crown servants are sued in the same action, that the same counsel is to conduct the Crown servants' defence in the absence of a conflict of interest;
- treating, to the greatest extent possible and consistent with counsel's obligations to protect the interest of the Crown, all communications with the Crown servant in confidence in any claim or proceeding for which the Attorney General of Canada has the authority under this policy to select and instruct counsel. The Crown will not use any information so disclosed in confidence by the Crown servant in any disciplinary or civil action against the servant;
- when at any time during a proceeding a conflict arises for a Department of Justice counsel or an agent of the Attorney General representing the Crown servant, the Attorney General could instruct such counsel to discontinue so acting. In such situations, the approval authority may authorize the engagement of private legal assistance in accordance with the terms of this policy;
- reviewing fees and disbursements proposed to be charged by private counsel to ensure they are within the limits established; and
- making recommendations in regard to a monetary settlement of a claim or an action made or brought against a Crown servant.

11. Appendix B to the TB Policy sets out the process for Crown Servants to be considered for legal assistance and indemnification, a Crown servant is required to:

- inform the appropriate official (normally the Crown servant's manager or supervisor) of the matter at the earliest reasonable opportunity after the servant becomes aware of a possible or actual suit, action or charge as a result of any alleged act or omission within the scope of the Crown servant's duties or within

their course of employment, so that the official has the opportunity to assist or guide the servant;

- be willing to authorize as early as possible the Department of Justice Canada to represent the Crown servant;
- submit a request to the approval authority in the organization in which the act or omission giving rise to the request first arose. The request should include how he or she meets the applicable criteria and should specify if the request is for legal assistance, indemnification or both. If the Crown servant's request exceeds deputy heads' approval limits listed in Appendix A and requires authority of the Minister or the Treasury Board, the request is to nonetheless first be made to the Crown servant's own deputy head (as applicable);
- where requesting to be represented by private counsel, state the reasons for such request and provide the name and proposed fee schedule of the preferred counsel;
- refrain from retaining private counsel until the appropriate approval authority has approved the request. A Crown servant who instructs counsel to begin work without the requisite approval may be personally responsible for payment of the resulting legal fees, costs and judgment;
- make a factual report to organizational management of the incident leading to the request for legal assistance or indemnification; and
- upon request by the requester's organization, authorize the Attorney General, or such other person as may be designated by the Attorney General, to defend his or her action, claim or charge using the required authorization form set out at the end of this appendix.
- Failure of a Crown servant to meet the above requirements may result in denial of legal assistance and indemnification and result in personal liability. An acquittal in offence cases, or dismissal of a civil suit, does not automatically entitle the servant to reimbursement of expenses that have been previously denied.

12. Appendix B also provides a template authorization form to be filled out by the Crown servant, with instructions that the following be added if there are multiple defendants:

I expressly waive solicitor–client privilege in favour of the Crown and the following co-defendant(s) who is/are also represented by the Attorney General of Canada, (insert name(s)), and I agree to a mutual sharing of material information with the Crown (and between these co-defendants). I understand, however, that counsel representing me will treat all communications between us in confidence to the extent possible consistent with counsel's obligation to protect the interests of the Crown. Where information provided by me in confidence is disclosed in the interests of the Crown, it is subject to the condition that it shall not be used by the Crown in any disciplinary or civil action against me.

I have been informed, and I understand, that I have the right to terminate this retainer at any time and to retain and instruct private counsel at my own expense. I have further been informed, and I understand, that should a conflict arise

between my interests and those of the Crown (or any of the co-defendant(s) named above) at any time during this litigation, it will be necessary for me to retain private counsel. I am aware, in that event, that I may apply for approval to retain private counsel at public expense under the Treasury Board Policy on Legal Assistance and Indemnification.

13. This authorization requires the signature of the Crown servant to acknowledge the terms and limitations of their rights in the solicitor-client relationship.
14. On or about August 16, 2013, DOJ lawyer Ms. P. was assigned the conduct of the defence of the Montague Claim. Supt. Paul Darbyshire advised Ms. P. that the RCMP did not have any reason for the DOJ not to represent the applicant, but advised Ms. P. that it would be her decision to determine whether or not there was a conflict.
15. Ms. P. represented the applicant in the Montague Claim between August 1, 2013 (the date the action was filed) and April 22, 2014.
16. On August 8, 2013, Anitra Singh, disclosed to RCMP Insp. Linda Blake an allegation about the applicant which, if true, would constitute sexual assault. As a result of the Montague and Singh allegations, the RCMP commenced an internal investigation. Anitra Singh refused to cooperate with the investigation.
17. The RCMP conducted a *Code of Conduct* investigation into the allegations made by Ms. Montague in her Notice of Civil Claim. On August 13, 2013, C/Supt. Abruzzese and Sgt. Wilson interviewed the applicant about the Montague allegations. The applicant was represented by Ms. P. in the Montague Claim at this time.
18. The Montague *Code of Conduct* investigation included efforts to interview Anitra Singh. One such effort was made by C/Supt. Abruzzese on August 29, 2013. Supt. Carol Bradley also attempted to interview Ms. Singh on at least two occasions prior to September 30, 2013.

19. In the fall of 2013, the applicant learned, through his employer, that Anitra Singh had made an allegation about him. The applicant was represented by Ms. P. at this time.
20. C/O Craig Callen's notebook from in or about October 2013 contains the following notes:
 - "Anitra Singh – acknowledged the letter & extended an invitation for her to meet [with] me"
 - "Anitra Singh .. Carol has had several communications .. leave me alone... comm through lawyer only"
21. On or about September 30, 2013, Ms. P. was provided with a CD containing documents to be reviewed for disclosure in the Montague Claim. In this package of documents was the PSU *Code of Conduct* Report for File #2013 – 6002 (the "*Montague Code of Conduct*"). Ms. P. represented the applicant at this time.
22. Attached to the Montague *Code of Conduct* Report, dated September 11, 2013, is a Briefing Note prepared by Staff Sergeant Eldon Dueck dated August 9, 2013 which included the following information with respect to Ms. Singh:

On August 8, 2013, Insp. Linda Blake, OIC Departmental Security Section, received additional information against Insp. Shields from another former member of Strategic Communications Section. Insp. Blake is maintaining periodic contact with C/M Anitra Singh, who has been on medical leave for approximately 18 months. During their telephone conversation on August 8, CM Singh commented to Insp. Blake that "Atoya's are just him showing her his stuff. Mine are him touching me." No further information was obtained from CM Singh at that time. It is believed that the time period CM Singh is referring to is around 2008. Insp. Shields has been cooperative, and was scheduled to be interviewed by C/Supt. Rosemary Abbruzzese, D/CROPS Policing Support Services on Monday, August 12, 2013. However, in light of the new information from CM Singh, the interview of Insp. Shields is being postponed until further information can be obtained from her. Health Services is being consulted as to whether CM Singh is medically fit to be interviewed; it will be arranged at the earliest possible opportunity.

Accordingly, Ms. P. had information at the time that Ms. Singh had made allegations against the applicant, which, if true, would constitute a criminal offence.

23. On October 30, 2013, a paralegal working for Ms. P. was advised that the allegations made against the applicant by Ms. Montague in the Montague *Code of Conduct* were found to be unsubstantiated. The paralegal requested the investigative materials by e-mail, noting “[Ms. P.] is eager to review and learn of the findings”. Ms. P. received the Montague *Code of Conduct* investigation file on or about November 1, 2013.
24. The DOJ was served with the Montague Claim on or about December 5, 2013.
25. On January 17, 2014, the applicant filed a request for funding for private counsel at public expense. One of the stated rationales was because of the “quasi-criminal nature of the allegations, and the potential conflict of interest between himself and the Crown.” On January 21, 2014, he was advised that he was not entitled to such representation because it was the DOJ’s assessment that there was no conflict between the applicant and the position of the Crown.
26. The applicant was served with the Notice of Civil Claim in the Montague Action on or about January 27, 2014.
27. The applicant engaged in a series of private solicitor-client communications, by e-mail and in person, with Ms. P. during the period of joint representation. Ms. P received direct instructions from the applicant by e-mail, telephone and in-person meetings on, among other dates: December 9, 2013, January 2, February 23, and February 24, 2014.
28. On January 28, 2014, the applicant signed an RCMP form, “REQUEST FOR LEGAL REPRESENTATION – CIVIL ACTION”. This form does not comply with the TB Policy, at Appendix “B”, for authorization in cases involving multiple defendants.
29. A paralegal with the DOJ prepared a cover letter from Ms. P to the applicant to be sent by e-mail, with an attached retainer letter and copy of the TB Policy. This correspondence was sent to Ms. P. for her review and approval on or about March 21, 2014, during the period of joint representation. There is no evidence that this correspondence was ever sent to the applicant.

30. On April 22, 2014, Ms. P. was notified by Ms. Jillian Frank that the applicant had retained her as independent legal counsel to represent him in the defence of the Montague Claim. After this point, Ms. P. no longer represented the applicant; however, she continued to be bound by the Law Society Rules and *BC Code of Professional Conduct*.
31. On April 25, 2014, Ms. P. wrote to Supt. Sullivan by e-mail. She advised:

I just wanted to let you know that Tim Shields has retained outside counsel at his own expense. I found out when his new counsel contacted me earlier this week. Were you aware of this? His counsel said that he had retained his own counsel just because he wanted more control in his own defence, which is fine. She also advised me that she was not aware of any conflict between his interests and those of the RCMP. Can you please confirm that there is no other code of professional conduct (ongoing or anticipated) or other investigation related to Insp. Shields, other than the code that was unsubstantiated last summer? I want to be sure there is no conflict.

Also, now that he has his own counsel, please ensure that the case is not discussed with him and that he does not obtain documents other than those that would be available to any member (eg his own personnel file).
32. The applicant has no evidence that Supt. Sullivan replied to Ms. P. on this point.
33. On July 10, 2014, Anitra Singh filed a notice of civil claim (the “Singh Claim”) against the applicant and the AGC in the Supreme Court of British Columbia, Vancouver Registry, under File No. S145374.
34. On Tuesday July 22, 2014, the applicant sent an e-mail to Ms. P. with a subject line of “Singh v. AG and Shields”. The first line of this e-mail reads, “The contents of this e-mail are protected by solicitor-client privilege”. The e-mail contained confidential information about the Singh Claim.
35. The same day, Ms. P. responded to the applicant by e-mail. She wrote, in part, “[p]lease note that there is no solicitor-client privilege over these communications as I do not have instructions from the RCMP that the DOJ will represent you in this matter”. She further stated, “At this point, I cannot answer your questions that require legal advice, but I can

tell you that I am not aware of any criminal investigation [...] nor have I heard anything beyond what has been in the news". Ms. P. also sent him a link to the TB policy.

36. The correspondence exchanged between the applicant and Ms. P. on July 22, 2014 were in fact privileged solicitor-client communications, notwithstanding that there was no formal retainer in place for the Singh Claim.
37. Ms. P. spoke with Supt. Sullivan about her communications with the applicant on July 22, 2014. She also forwarded her communications with the applicant to Supt. Sean Sullivan.
38. The applicant had reason to believe that the DOJ would represent him in the Singh Claim, given its position with respect to the Montague Claim. The applicant also had reason to believe that his former lawyer, Ms. P. would not later assist the RCMP in pursuing an internal and criminal investigation into the allegations of sexual assault raised in the Singh Claim.
39. The RCMP commenced an investigation into the applicant on July 29, 2014, headed by Insp. Shawn Gill (Team Leader), Insp. Jeanette Theisen and Cpl. Heather Matthew (File Coordinator). The RCMP *Code of Conduct* and the criminal investigation were conducted simultaneously.
40. The DOJ filed a response to the Montague Claim on July 24, 2014. The response to civil claim was signed by Ms. P. Therein, she asserted that the defendants (*sic*, there was only one, the AGC) had acted properly in the performance and execution of their duties, and, in the alternative, pleaded that if the acts alleged in the Montague Claim had occurred, they were not in the execution or performance of duties.
41. Efforts to obtain a statement from Ms. Singh were made, without success, during the fall of 2014. The obtaining of a statement from Ms. Singh was the single most important investigative step required to advance the investigation.

42. On Wednesday, September 10, 2014, Insp. Jeanette Theisen and Cpl. Heather Matthew attended at Ms. Singh's residence to obtain a statement. Insp. Theisen's notes indicate that Ms. Singh was upset that the investigators attended at her residence without calling in advance or contacting her lawyer. Insp. Theisen called Ms. Singh's lawyer's office. Her notes indicate that she left a message for Art Vertlieb, Q.C. requesting that Ms. Singh provide a statement for possible criminal charges based on the nature of the allegations in the Singh Claim, and that in order to proceed with the investigation, the RCMP would require a statement from Ms. Singh.
43. On September 11, 2014, then counsel for Ms. Singh, Art Vertlieb Q.C., sent a letter to Ms. P. to inform her of the RCMP contact with his client. His letter states in part that two female officers attended at his client's apartment on September 9 [sic] without prior notice, and requested a statement from her regarding her "very serious allegations". He advised that the Inspector [Theisen] left word with his office that they are considering whether or not charges should be laid criminally against the defendant (the applicant). He voiced concern about the police contacting his client when she is represented by counsel. He advised that he would not be contacting the investigators, except through counsel. He requested clarification as to what had just transpired and what the RCMP was seeking from his client.
44. Ms. P. spoke by telephone with Mr. Vertlieb, Q.C. on September 11, 2014. Ms. P.'s notes of this conversation indicate that Mr. Vertlieb, Q.C. advised her that he was told the RCMP were considering laying criminal charges against the applicant. Ms. P. noted in a memorandum to file that she did not "confirm or deny this".
45. A letter prepared by Insp. Theisen was apparently sent to Supt. Sullivan to be forwarded to the DOJ. The purpose of the letter was to explain Insp. Theisen's reasons for attending Ms. Singh's residence. Insp. Theisen expected the DOJ to make amendments before responding to Mr. Vertlieb's letter of September 11, 2014. This letter has not been disclosed to the applicant, and on April 4, 2017 Insp. Theisen reported that this letter/memo cannot be located and that all avenues for retrieval have been exhausted.

46. By September 11, 2014 at the latest, Ms. P. knew or ought to have known that the RCMP were conducting a criminal investigation into her former client, the applicant, related to the same allegations reported in the Montague *Code of Conduct* Report and alleged in the Singh Claim. Ms. P. did not withdraw from the file, despite the existence of a disqualifying conflict of interest.
47. On September 12, 2014, Insp. Theisen received direction from C/Supt. Brian Cantera that the RCMP would be interviewing Atoya Montague. She also had a conversation with Sean Sullivan. The notes of that conversation include:

DOJ – concerns – disruption of civil case

Art Vertlieb called DOJ upset at us going to Anitra's door, it essentially bolsters their civil suite [sic]. They will not provide a stmt? E-mail to Sean – it was not specifically said DOJ feels they won't however we could follow up w [sic] a phone call or letter.

48. On September 16, 2014, Ms. P. wrote to Mr. Vertlieb Q.C. and explained, *inter alia*:

I am advised as a result of the allegations raised by your client in this civil action, the RCMP has commenced an internal investigation into the allegations pursuant to the [RCMP Act] and possibly other legislation. [...]

As your client has refused to speak with the investigators, would you please advise as soon as possible whether she is prepared to provide a written statement or response to written questions prepared by the RCMP for the purposes of assisting in the internal investigation. [Emphasis added.]

49. Mr. Vertlieb Q.C. responded on September 16, 2014 and expressed his concerns regarding the RCMP's approach.
50. On Wednesday September 17, 2014, Supt. Sullivan sent an e-mail to C/Supt. Cantera, Insp. Theisen and Insp. Gill attaching Ms. P.'s letter of September 16, 2014. He reported that, "DOJ has asked that we consider using the terminology referenced in the letter as you advance your investigation". [Emphasis added.]

51. This instruction by Ms. P. was to advise the RCMP investigators to advance their criminal investigation without using the terminology of a *Criminal Code* investigation or criminal allegations.
52. Insp. Theisen's notes from that day indicate that she spoke with Supt. Sullivan and that it was decided that, "we (RCMP) will liaise thru [*sic*] him to DOJ".
53. On September 26, 2014, Mr. Vertlieb, Q.C. wrote to Ms. P. to request a response from the DOJ to the Notice of Claim. The DOJ filed a response to the Singh Claim on October 14, 2014. The response to civil claim was signed by Ms. P.
54. On October 20, 2014, Supt. Sean Sullivan wrote to Ms. P. and asked whether counsel for Singh or Montague have advised whether they will cooperate in providing a statement.
55. On October 21, 2014 Mr. Vertlieb sent a fax to Ms. P. in which he wrote:

As indicated to you, Ms. Singh was upset at the unannounced attendance by RCMP to speak with her. However, now that she understands the situation more fully, she is agreeable to providing answers to the investigator's written questions. Please send those questions to us.
56. On October 28, 2014 Insp. Gill, Cpl. Matthew, and Sgt. Lillies met to discuss the questions for the Singh and Montague investigations.
57. On November 14, 2014, Insp. Gill e-mailed draft copies of the RCMP questions for both the Montague and Singh investigation to Ms. P. and requested her suggestions. Ms. P made revisions to both letters, dated November 13, 2014, and sent them back to Insp. Gill the same day. In her responding e-mail she wrote, in part:

[p]lease see the attached letters with my comments and suggested changes. They are mostly set out in the Singh letter but apply equally to the Montague letter as well. Thank you for providing me the opportunity to review the letters.
58. Ms. P suggested the deletion of her name from the letter. She explained in the comments applicable to both letters, "[a]s this is not a litigation matter, I should not be mentioned in the letter. Any advice I provide is protected by solicitor-client privilege in any event."

59. Some, if not all, of the suggestions made by Ms. P. were accepted by the RCMP investigators. Ms. P. sent out the letters to counsel for Ms. Singh and Ms. Montague on November 25, and 26, 2014 respectively. Ms. P. was directly assisting the RCMP in investigating criminal allegations, contrary to the interests of her former client, Shields.
60. On November 20, 2014, Ms. P. requested a copy of the *Code of Conduct* currently being investigated from Insp. Gill.
61. On December 16, 2014, Ms. P. exchanged e-mails with Insp. Gill in which she requested an update as to the status of the investigations against Shields with respect to Singh and Montague. Insp. Gill advised that the investigators were “awaiting responses from the respective counsels, which will ultimately determine the way forward”. Ms. P. responded, “I take that to mean that the investigation is essentially on hold until counsel provide responses? What if they do not provide responses?”. Insp. Gill confirmed that the investigations were on hold until responses were provided, but advised “either way, we eventually have to provide Insp. Shields with an opportunity to provide a version”. Insp. Gill noted that there was a 1 year limitation on a *Code of Conduct* investigation.
62. The expiry date for the *Code of Conduct* concerning Ms. Singh’s allegations against the applicant was July 10, 2015.
63. On December 16 and 17, 2014, letters were sent by Ms. P. to counsel for Singh and Montague respectively, requesting their clients’ responses to the questions set out in the letters.
64. On January 8, 2015, David K. Georgetti of Mr. Vertlieb, Q.C.’s firm wrote to Ms. P. and confirmed receipt of the November 13, 2014 letter, noted that it listed Insp. Gill as the investigating officer and asked, *inter alia*, why member(s) involved in the investigation had changed.

65. Insp. Gill and Ms. P. exchanged e-mails between January 12 and 15, 2015 regarding Mr. Georgetti's letter. Ms. P. opined that Mr. Georgetti's questions were "irrelevant and unnecessary in the circumstances", but continued to say, "it may be best to cooperate with him in providing brief responses, in the hope that Ms. Singh will still cooperate before the one year limitation expires".
66. On January 19, 2015, counsel for the applicant had a without prejudice conversation with Ms. P. regarding the Singh Claim, which communications remain subject to settlement privilege. Ms. P. reported to Supt. Sullivan by e-mail the same day to provide him an update.
67. On January 20, 2015, Ms. P. responded to Mr. Georgetti's letter of January 9, 2015. She said, in part:

We can advise that Insp. Gill is the Team Commander on the RCMP file. There has been no change to the investigators in this matter. Further, the internal investigation regarding Insp. Shields is based on the allegations made by Ms. Singh in her Notice of Civil Claim. In the course of the investigation, consideration will be given to whether a criminal investigation may be warranted. This would explain the references to both civil and criminal matters. [...] It is now nearly two months since we forwarded you Insp. Gill's letter of November 13, 2014 and we look forward to receiving Ms. Singh's responses to the questions therein without further delay.

68. On January 21, 2015, Insp. Theisen provided the following explanation to Ms. P. regarding the nature of her initial phone call to Ms. Singh's civil lawyer:

I left a message requesting a phone call regarding an internal investigation that had implications towards a member of the RCMP. I did further state that the allegations were criminal in nature and if necessary would be investigated as such.

She continued to explain to Ms. P.:

The reality is – yes the allegations Ms. Singh makes are sexual assault which ultimately is criminal code so I am not sure what the issue is with Ms Singh's counsel and my message.

69. On January 23, 2015, a draft updated briefing note on “Singh v. Shields” was e-mailed to Sean Sullivan and Jeff Hurry. The briefing note contained information protected by settlement privilege between the DOJ and counsel for Mr. Shields, including Mr. Shields’ defence to the allegations which are the subject of the Information before this Court.
70. On January 29, 2015, Supt. Sullivan forwarded the briefing note to C/Supt. Brian Cantera, Karen Howden, and to investigators Insp. Gill and Insp. Theisen. He wrote, in part:
- Insp. Shields unexpectedly and without notice contacted the plaintiff’s counsel with an offer to settle. We have not established the mode of communication that this offer was sent and have requested copies. We also do not know what the plaintiff’s response is. I have DOJ working on it. The key piece of evidence is Insp. Shields allegedly reports that [...].
71. On January 30, 2015, Mr. Georgetti responded to Ms. P.’s letter of January 30, 2015 and advised that his client’s “instructions are to follow the usual procedure in civil litigation matters which should give you ample opportunity to ask all the relevant questions you feel need to be canvassed with my client”.
72. On February 9, 2015, Ms. P. advised Insp. Gill of Mr. Georgetti’s position. Her e-mail to Insp. Gill says, in part, “[p]lease let me know how the code of conduct investigation will proceed in light of this development, and advise me if you are permitted to and intend to compel a statement from Ms. Singh for the purpose of the investigation. I am available to discuss this matter.”
73. On February 12 and 13, 2015, Ms. P. had telephone conversations with Insp. Gill in which they discussed the solicitor-client privilege attaching to their communications, and her advice as to the retention of the DOJ correspondence in his file.
74. On or about March 25, 2015, Ms. Singh changed counsel. Ms. Singh retained Mr. Greg Heywood.

75. Between March 25, 2015 and March 31, 2015, Insp. Gill and the applicant exchanged e-mails in which the applicant agreed to provide a voluntary statement for the purpose of the *Code of Conduct* investigation regarding Ms. Singh's allegations.
76. On March 25, 2015, Insp. Gill wrote to Ms. P. by e-mail seeking her thoughts on the applicant's statement of defence to the Singh Claim and whether there was anything that could be used in the interview of the applicant.
77. On March 29, 2015, Ms. P wrote to Insp. Gill by e-mail. She said in part:
- Ms. Singh's new lawyer, Mr. Gregory Heywood, left me a message on Friday indicating that his client may be willing to participate in the code of conduct investigation involving Tim Shields, on terms to be discussed. [...] I will speak with Mr. Heywood as soon as I can to discuss Ms. Singh's proposed involvement in the investigation.
78. On March 29, 2015, Mr. Heywood sent a "without prejudice" e-mail to Ms. P. in which he discussed the contents of the applicant's without prejudice offer to settle the Singh Claim.
79. On March 31, 2015, Insp. Gill delayed the interview of the applicant, advising that further follow up was required before he could provide a statement.
80. On April 13, 2015, Ms. P. and Ms. E. (another DOJ lawyer) participated in a "without prejudice" meeting with Ms. Singh's civil counsel, Greg Heywood. During this meeting it was communicated that the deadline for the *Code of Conduct* was early July 2015 and that the RCMP would need time to interview other witnesses. Ms. E. has made notes of this meeting, which have not been disclosed to the applicant.
81. On April 16, 2015, Ms. P. advised Supt. Sean Sullivan that she had received Ms. Singh's written responses to the questions prepared by Singh. She advised that she had not forwarded him the e-mail sent to Insp. Gill attaching the response as she recalled Sullivan previously saying that he would prefer to remain at arm's length from the investigation. She offered to send the responses to Sullivan upon his request.

82. The same day, Ms. P. wrote an e-mail to Insp. Shawn Gill at 11:19 am, and briefed him on the meeting.
83. On April 28, 2015, Insp. Gill met with Cpl. Matthew and Sgt. Lillies to discuss the interview of Ms. Singh. His notes include the following: "advised that Sgt. Lillies may have conflict because of her advisor role. S/Sgt. [illegible] to discuss with CO whether the VPD should investigate statutory".
84. The statement of Ms. Singh was taken on May 6, 2015 by Cpl. Matthew, monitored by Insp. Gill, at the offices of Roper Greyell. During the introductory phase of the interview, Cpl Matthew stated, in part:

We've obtained as much as we can with the information you provided where we can go, who we can ask and we've pulled as much detail as we can. So understand that ya know, I um, I know that something happened ya know, I, I, I truly believe that something did happen whether it be in the washroom or in another location, that something did happen. And what our goal here today is to get as much detail as we can because obviously there's a criminal aspect of this that we need to obtain of information for the courts pending ya know, a cro-, a Report to Crown Counsel would be written.

85. The statement concluded at 12:45 p.m. Insp. Gill and other RCMP members met with DOJ counsel, Ms. P., and another DOJ lawyer, Ms. E., between 13:47 and 14:40 hours and briefed them on the interview.
86. On May 15, 2015, Ms. P. e-mailed Insp. Gill advising him that she would no longer be handling this matter. She said, in part:

Given that you intend to recommend criminal charges be laid against Tim Shields, a conflict of interest has arisen for our office in that I represented Tim for a short time in the Montague matter. As I can no longer handle this matter, all litigation involving Tim Shields, Atoya Montague and Anitra Singh will be reassigned to new DOJ counsel as soon as possible. Sean Sullivan will be notified once the transfer is completed [...] It was a pleasure working with you and thank you for your assistance throughout.

Insp. Gill responded by e-mail, thanking Ms P. for her “support and guidance throughout this matter”.

87. The provision of legal assistance to the criminal investigators by Ms. P. was a serious violation of her professional and ethical obligations to her former client, the applicant.
88. The applicant’s without prejudice settlement offer to Ms. Singh was disclosed to the RCMP investigators by Ms. Singh. The RCMP sent a copy of the settlement offer to Crown counsel. Crown counsel advised by letter dated January 31, 2017 that she did not read the contents of the letter and had a staff member seal it and return it to Ms. Singh’s binder. The *Stinchcombe* disclosure contains two photocopies of a Ministry of Justice envelope marked “private and confidential”, and “without prejudice”.
89. The Attorney General of Canada, represented by the DOJ and Ms. Singh, represented by Greg Heywood, reached a settlement in the Singh Claim following mediation on or about December 9, 2016. Ms. Singh subsequently discontinued against the applicant.

Legal Basis - The Governing Legal Principles, Abuse of Process

90. The doctrine of abuse of process is intended to guard against state conduct that society finds unacceptable, and which threatens the integrity of the justice system. The doctrine provides trial judges with a wide discretion to issue a remedy - including the exclusion of evidence or a stay of proceedings - where doing so is necessary to preserve the integrity of the justice system or the fairness of the trial: *R. v. Babos*, 2014 SCC 16 (CanLII), [2014] 1 S.C.R. 309.
91. The onus lies on the applicant to establish, on a balance of probabilities, that an abuse of process has occurred.
92. In *Babos*, the Court revisited the law of abuse of process as it relates to state conduct that does not affect trial fairness, but nonetheless impinges on the integrity of the justice

system, such that in rare cases, a stay of proceedings should be ordered. Moldaver J explained:

[30] A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12 (CanLII), [2002] 1 S.C.R. 297, at para. 53). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.

[31] Nonetheless, this Court has recognized that there are rare occasions – the “clearest of cases” – when a stay of proceedings for an abuse of process will be warranted (*R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused’s trial (the “main” category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the “residual” category) (*O'Connor*, at para. 73). The impugned conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.

[32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:

- (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that “will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome” (*Regan*, at para. 54);
- (2) There must be no alternative remedy capable of redressing the prejudice; and
- (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against “the interest that society has in having a final decision on the merits” (*ibid.*, at para. 57).

[33] The test is the same for both categories because concerns regarding trial fairness and the integrity of the justice system are often linked and regularly arise in the same case. Having one test for both categories creates a coherent framework that avoids “schizophrenia” in the law (*O'Connor*, at para. 71). But while the framework is the same for both categories, the test may – and often will – play out differently depending on whether the “main” or “residual” category is invoked.

93. At the first stage of the test, where it is the “residual” category at play, the Court should consider whether “proceeding in light of the impugned conduct would do further harm to the integrity of the justice system” and “whether proceeding would lend judicial condonation to the impugned conduct”: *Babos*, para. 38.
94. In terms of the second and third stages of the framework, Moldaver J explained:

[39] At the second stage of the test, the question is whether any other remedy short of a stay is capable of redressing the prejudice. Different remedies may apply depending on whether the prejudice relates to the accused's right to a fair trial (the main category) or whether it relates to the integrity of the justice system (the residual category). Where the concern is trial fairness, the focus is on restoring an accused's right to a fair trial. Here, procedural remedies, such as ordering a new trial, are more likely to address the prejudice of ongoing unfairness. Where the residual category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system, remedies must be directed towards that harm. It must be remembered that for those cases which fall solely within the residual category, the goal is not to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.

[40] Finally, the balancing of interests that occurs at the third stage of the test takes on added significance when the residual category is invoked. This Court has stated that the balancing need only be undertaken where there is still uncertainty as to whether a stay is appropriate after the first two parts of the test have been completed (*Tobiass*, at para. 92). When the main category is invoked, it will often be clear by the time the balancing stage has been reached that trial fairness has not been prejudiced or, if it has, that another remedy short of a stay is available to address the concern. In those cases, no balancing is required. In rare cases, it will be evident that state conduct has permanently prevented a fair trial from taking place. In these “clearest of cases”, the third and final balancing step will often add little to the inquiry, as society has no interest in unfair trials.

[41] However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or

reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits.[5] Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.

95. Moldaver J. endorsed the opinion in *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659 that it is only where an “affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases that a stay of proceedings will be warranted”: *Babos*, para. 44.

Legal Basis: the impact on this prosecution

96. In January 2015, the applicant, through counsel, made a “without prejudice”, liability denied, offer to settle the Singh Claim through Mr. Vertlieb Q.C. The gist of that offer was communicated to Ms. P., who properly communicated it to Supt. Sullivan, the RCMP officer responsible for providing instructions to the DOJ. However, Supt. Sullivan improperly communicated this information, including the applicant’s version of events, to the criminal investigators. This evidence was also provided to Crown counsel both through the investigators, and through the documents disclosed by Ms. Singh.
97. The solicitor-client relationship and privilege are principles of fundamental importance to the administration of justice. A DOJ lawyer who advises police criminal investigators on an investigation into a former individual Crown servant, who was a former client of that lawyer and sought legal advice from this lawyer on a related matter, commits a breach of sections 7, 8, and 11 of the *Canadian Charter of Rights and Freedoms*. Prejudice to the applicant is presumed.

98. The communication of the contents of the settlement offer to the RCMP and Crown counsel constituted a violation of settlement and litigation privilege, and of the right to silence, as guaranteed by sections 7 and 13 of the *Charter*.
99. The facts herein establish, *inter alia*, that:
- (1) Ms. P. and the applicant had exchanged solicitor-client protected, privileged communications about both the Montague and Singh matters before September 2014;
 - (2) Ms. P. played an active role in assisting the criminal investigation into her former client between September 2014 and May 2015. She was in breach of her duties of loyalty and confidentiality to the applicant by acting against his interest in the criminal investigation;
 - (3) There is a substantial risk that the confidential information held by Ms. P. was used to the detriment to the applicant;
 - (4) As a result of Ms. P.'s involvement in both the Singh Claim and the criminal investigation and her failure to address the conflict, the applicant's defence to the criminal charges was improperly disclosed to the RCMP investigators, and then to Crown counsel;
 - (5) Ms. Singh would not have provided a statement to the RCMP investigators without the assistance of Ms. P.;
 - (6) The RCMP and DOJ acknowledged that without a statement from Ms. Singh there could be no *Code of Conduct* or criminal investigation against the applicant; and
 - (7) Ms. P. failed to bring this serious conflict of interest to the attention of the applicant at any time.
100. The TB policy is the only policy which deals with the issue of joint representation. The fact that this policy provides no direction or guidance to DOJ counsel on how to assess and resolve conflicts of interest, creates a serious concern respecting institutional failure to implement the *Code of Professional Conduct* and a future serious concern that if the Court does not distance itself from what transpired in this case, this type of conduct by the RCMP and the DOJ may be repeated.

101. Prejudice to the applicant is presumed in a situation such as this, where the Crown and criminal investigators come into possession of defence communications which are protected by settlement privilege.
102. The collective conduct of Ms. P, the DOJ and the RCMP taints the investigation and the evidence obtained thereby, and indeed this prosecution. It breached the rights of the applicant under s. 7 of the *Charter*, and furthermore abused the process of the courts: *R. v. O'Connor*, [1995] 4 S.C.R. 411, 1995 CanLII 51 (SCC).

Legal Basis: Remedy

103. The Applicant says that in order to prevent the perpetuation of the abuse of process and the need to protect the integrity of the administration of justice, the prosecution must be permanently stayed pursuant to section 24(1) of the *Charter*.
104. Alternatively, the Applicant asks this Court to exclude all testimony and other evidence of Ms. Singh in the trial of this matter, pursuant to s. 24(2) of the *Charter*.

RELIEF SOUGHT:

1. The Orders set out in the first five paragraphs of this Notice of Application.
2. The costs of this application payable to the applicant.

IN SUPPORT OF THIS APPLICATION, THE APPLICANT RELIES ON THE FOLLOWING:

1. Disclosure materials and exhibits as may be filed.
2. Oral evidence to be given at the hearing of this application.
3. Oral submissions from counsel to be made at the hearing of this application.
4. Such further and other material and evidence as counsel may advise and this Honourable Court may permit.

THE APPLICANT MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPLICATION by service in accordance with Rule 3(5):

Except where a document is to be served personally, service may be effected on a person or corporation by serving the counsel of record of the person or corporation, and this service may be effected

- (a) by mailing a copy by ordinary mail to the counsel's office;
- (b) by leaving a copy with a solicitor or employee in the counsel's office; or
- (c) by telephone transmission of a facsimile of the document.

DATED: May 16, 2017


for DAVID G. BUTCHER, Q.C.
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INFORMATION / DÉNONCIATION

Court Identifier: 2040: PRA
Court File Number: 241855
Type Reference:
Inf. Seq Number: 1
Agency File Number: EHQ:14-5515

DNA: ☒ SOR: ☒ K File: ☐

CANADA
PROVINCE OF BRITISH COLUMBIA
PROVINCE DE LA COLOMBIE-BRITANNIQUE

"By Indictment"

This is the information of / Les présentes constituent la dénonciation de **Heather Matthew**, a / un(e) **Peace Officer** (the "Informant" / le "Dénonciateur") of / de **Surrey**, British Columbia / Colombie-Britannique.

The informant says that the informant has reasonable and probable grounds to believe and does believe that / Le dénonciateur déclare qu'il a des motifs raisonnables et probables et croit effectivement que

Count 1

Timothy William Leslie SHIELDS, between the 1st day of July, 2009 and the 30th day of October, 2010, at or near Vancouver, in the Province of British Columbia, did sexually assault A.S., contrary to Section 271(1) of the Criminal Code.

THE INFORMATION SWORN ON **MAY 10, 2016** CONTAINS A TOTAL OF 1 COUNT ON 1 PAGE.

SWORN BEFORE ME / ASSERMENTÉ DEVANT MOI
ON / CE 10TH DAY OF / JOUR DE **MAY**, 2016
AT / À **VANCOUVER**
BRITISH COLUMBIA / COLOMBIE-BRITANNIQUE

K. Anderson 2016.05.10 08:52:56
-07'00'

A JUSTICE OF THE PEACE IN AND FOR THE
PROVINCE OF BRITISH COLUMBIA /
UN JUGE DE PAIX DANS ET POUR LA
PROVINCE DE LA COLOMBIE-BRITANNIQUE

Tue May 10 2016 08:52:59

SIGNATURE OF INFORMANT /
SIGNATURE DU DÉNONCIATEUR

Timothy William Leslie SHIELDS: Warrant
PROCESS / ACTE DE PROCÉDURE ISSUED

K. Anderson 2016.05.10 08:53:20
-07'00'

A JUSTICE OF THE PEACE IN AND FOR THE
PROVINCE OF BRITISH COLUMBIA /
UN JUGE DE PAIX DANS ET POUR LA
PROVINCE DE LA COLOMBIE-BRITANNIQUE